

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Tobacco Valley Communications, Inc.)	CSR-8877-A
)	Docket No. 14-45
To Exclude Eureka and the Remainder of North)	
Lincoln County from the Spokane, Washington)	
DMA and Include it in the Missoula, Montana)	
DMA)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 6, 2014

Released: May 6, 2014

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Tobacco Valley Communications, Inc. (“TVC”), filed the above-captioned petition for special relief seeking to exclude the cable community of Eureka, Montana (“Eureka”), from the Spokane, Washington designated market area (“Spokane DMA”) and to include Eureka in the Missoula, Montana designated market area (“Missoula DMA”).¹ The Petition is unopposed. For the reasons discussed below, we dismiss TVC’s Petition without prejudice.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act of 1934, as amended (the “Act”), and implementing rules adopted by the Commission, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within their markets.² A station’s market is its “designated market area,” or DMA, as defined by Nielsen Media Research.³ A DMA is a geographic market designation that defines each television market exclusive of others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, the total television viewing audience attained by a broadcast station is considered, regardless of the delivery technology used to receive its signal – whether the signal is received over-the-air, or via

¹ Petition for Special Relief of Tobacco Valley Communications, Inc., filed Mar. 11, 2014, at 1 (“Petition”).

² *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2976-2977 (1993) (“*Must Carry Order*”).

³ Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station’s market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station’s market be defined by The Nielsen Company’s DMAs. 47 C.F.R. § 76.55(e); *see Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) (“*Modification Final Report and Order*”).

cable, wireless cable, DBS, SMATV or OVS systems.⁴

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's market to better effectuate the purposes of this section.⁵

In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as -

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁶

4. In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁷ In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modifications that requires the following evidence be submitted:

- (1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.
- (2) Grade B contour maps⁸ delineating the station's technical service

⁴ For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁵ 47 U.S.C. § 534(h)(1)(C).

⁶ *Id.*

⁷ *Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

⁸ Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit. The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographic

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area⁹ and showing the location of the cable system headends and communities in relation to the service areas.

(3) Available data on shopping and labor patterns in the local market.

(4) Television station programming information derived from station logs or the local edition of the television guide.

(5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(6) Published audience data for the relevant station showing its average all day audience (*i.e.*, the reported audience averaged over Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.¹⁰

5. Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

6. In the *Carriage of Digital Television Broadcast Signals First Report and Order* (“*DTV Must Carry Report and Order*”), the Commission concluded that under Section 614(a) of the Act, digital-only television stations had mandatory carriage rights, and amended its rules to reflect this.¹¹ The Commission also clarified its framework for analyzing market modifications for digital television stations.¹² It found that the statutory factors in Section 614(h), the current process for requesting market modifications, and the evidence needed to support such petitions, would be applicable to digital television

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features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

⁹ While the Grade B contour defined an analog television station's service area, *see* 47 C.F.R. § 73.683(a), with the completion of the full power digital television transition on June 12, 2009, there are no longer any full power analog stations. Instead, as set forth in Section 73.622(e), a station's DTV service area is defined as the area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited service level – which for VHF stations is 28 dBu. *See* 47 C.F.R. § 73.622(e). Accordingly, the Commission has treated a digital station's noise limited service contour as the functional equivalent of an analog station's Grade B contour. *See Report To Congress: The Satellite Home Viewer Extension and Reauthorization Act of 2004; Study of Digital Television Field Strength Standards and Testing Procedures*, 20 FCC Rcd 19504, 19507 ¶ 3, 19554 ¶ 111 (2005); *Implementation of the Satellite Home Viewer Extension and Reauthorization Act of 2004, Implementation of Section 340 of the Communications Act*, Report and Order, 20 FCC Rcd 17278, 17292 ¶ 31 (2005). *See also Lenfest Broadcasting, LLC*, 19 FCC Rcd 8970, 8974 ¶ 7 n.27 (2004) (“For digital stations operating on channels 14-69 [UHF stations], for market modification purposes the 41 dBu DTV service area contour is the digital equivalent of an analog station's Grade B contour.”).

¹⁰ 47 C.F. R. § 76.59(b).

¹¹ *See* 16 FCC Rcd 2598, 2606 ¶ 15, 2610 ¶ 28 (2001); 47 C.F.R. § 76.64(f)(4).

¹² *See* 16 FCC Rcd at 2635-36 ¶¶ 84-85. The Commission affirmed that for digital signal carriage issues, it would continue to rely on the Nielsen Company's market designations, publications, and assignments it used for analog signal carriage issues. *See id.* at 2636 ¶ 85.

modification petitions.¹³ While the Commission presumed the market of a station's digital signal would be coterminous with that station's market area for its prior analog signal, it recognized that the technical coverage area of a digital television signal may not exactly replicate the technical coverage area of its former analog television signal.¹⁴ Therefore, in deciding DTV market modifications, the Commission would take changes in signal strength and technical coverage into consideration, on a case-by-case basis.

III. DISCUSSION

7. The Petition requests that the Commission exclude the cable community of Eureka¹⁵ from the Spokane DMA and include Eureka in the Missoula DMA. TVC argues that the Eureka community is so far removed from the Spokane DMA, that Eureka cannot be considered part of the market of the Spokane television stations.¹⁶ Rather, TVC argues, Eureka is closer to and shares stronger economic ties to the Missoula DMA and thus should be considered part of the market of the Missoula stations.¹⁷ TVC can only achieve its desired objective through a market modification request if it shows that the Eureka community should be included or excluded from the markets of all stations in the respective DMAs.¹⁸ Therefore, the issue before us is whether the Eureka community should be excluded from the markets of stations in the Spokane DMA and included in the markets of stations in the Missoula DMA.

8. The first statutory factor we consider in determining whether to grant a market modification petition is "whether the station, or other stations located in the same area have been historically carried on the cable system or systems within such community."¹⁹ TVC states that it has not historically carried any of the Spokane stations but has historically carried the Missoula stations.²⁰ TVC mentions three Missoula stations for which it claims historical carriage.²¹ To support its claim, TVC provides two programming guides (one from 2004 and one from 2013) and its current channel line-up to indicate the Missoula stations have been historically carried on its cable network.²²

9. The second statutory factor is "whether the television station provides coverage or other

¹³ See *DTV Must Carry Report and Order*, 16 FCC Rcd at 2636 ¶ 85.

¹⁴ See *id.* In adopting technical rules for the digital transmission of broadcast signals, the Commission attempted to ensure that a station's digital over-the-air coverage area would replicate as closely as possible its former analog coverage area. See *id.* at 2636 ¶ 85 n.254, citing *Sixth DTV Report and Order*, 12 FCC Rcd 14588, 14605 ¶ 29 (1997).

¹⁵ The Petition clarifies that the recently registered Eureka cable community consists of communities located in North Lincoln County including, but not limited to, Eureka, Rexford, Trego, Fortine, West Kootenai, and Stryker. Petition at 3.

¹⁶ *Id.* at 12-13.

¹⁷ *Id.*

¹⁸ We note that Section 614(h)(1)(C) only contemplates adding or subtracting stations, not entire communities. See 47 U.S.C. § 534(h)(1)(C). However, the Commission has said that we will not preclude a cable provider from petitioning for the market modification of multiple stations in the same community. See *Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139 (providing that a cable operator could petition for market modifications for more than one station licensed to the same community as long as the cable operator submitted information demonstrating that each station is entitled to have its market modified). Therefore, TVC may still achieve its desired remedy if it successfully modifies the markets of all stations relevant to its petition.

¹⁹ 47 U.S.C. § 534(h)(1)(C).

²⁰ Petition at 10, 14-15. Specifically, TVC claims that it has not carried a Spokane station since 2009 with only one exception. *Id.* at 10, n. 6.

²¹ TVC claims that it has carried Missoula DMA station KCFW for more than 20 years, KPAX for 12 years, and KTMF for 3 years. *Id.* at 14.

²² *Id.* at Exhibits D, E, L. The resolution of Exhibit E renders the station call-signs illegible.

local service to such community.”²³ TVC states that Eureka is geographically more distant to Spokane than to Missoula and that none of the Spokane stations provide off-air signals to Eureka, while the Missoula stations do.²⁴ TVC provides signal coverage maps of four Missoula stations and four Spokane stations to demonstrate that Missoula stations can cover Eureka with an off-air signal whereas the Spokane stations cannot.²⁵ TVC also provides geographical maps and driving directions to demonstrate the distances between the cities of Spokane, Missoula, and Eureka.²⁶ TVC states that the Spokane stations do not provide any local programming or advertisement of interest to Eureka or even to the state of Montana.²⁷ TVC provides single screenshots from four Spokane stations’ websites to demonstrate that their content is not focused on Montana.²⁸

10. The third statutory factor is “whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community.”²⁹ For this factor, TVC states that Missoula stations provide programming and advertisements directed at Northwestern Montana, as well as political and public service programming relevant to Montana residents.³⁰

11. The fourth statutory factor concerns “evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.”³¹ TVC admits that viewing data specific to Eureka is difficult to obtain, but argues the available evidence supports excluding Eureka from the Spokane DMA and including it in the Missoula DMA.³² TVC also states that because satellite networks in Eureka carry only the Spokane stations pursuant to their must carry obligations, viewership data may be skewed towards the Spokane stations.³³ TVC states that more than 800 signatures have been collected on a petition that supports receiving the Missoula stations’ signals.³⁴ TVC cites a previous Commission decision where we found that a Spokane station was not significantly viewed and argues that the factors in that case are nearly identical to those in the current petition.³⁵ Applying the precedent, TVC argues that the Commission should not consider the Spokane stations to be significantly viewed in Eureka.³⁶

12. We find that TVC has not made a sufficient showing to indicate that its requested market modifications would be appropriate. For a cable operator to petition for modification of more than one station’s market in the same community, the cable operator must submit information for each station

²³ 47 U.S.C. § 534(h)(1)(C).

²⁴ Petition at 10, 15.

²⁵ *Id.* at Exhibit J.

²⁶ *Id.* at Exhibits F, G, H, I.

²⁷ Petition at 10, 15-16.

²⁸ *Id.* at Exhibit M.

²⁹ *See* 47 U.S.C. § 534(h)(1)(C).

³⁰ Petition at 16.

³¹ *See* 47 U.S.C. § 534(h)(1)(C).

³² Petition at 10, 16-19.

³³ *Id.* at 16-17.

³⁴ *Id.* at 17-18.

³⁵ *Id.* at 18-19.

³⁶ *Id.* at 19

demonstrating that modification is warranted.³⁷ A cable operator may not rely on generalizations to collectively argue for all stations in an entire community.³⁸ TVC's evidentiary presentation is thus lacking for two reasons. First, TVC does not identify with specificity all of the stations that are at issue in its market modification request. Second, TVC has not submitted enough information with regards to each station to demonstrate that market modification is warranted.

13. TVC has not identified all of the stations at issue in its market modification request. The text of the Petition collectively refers to the stations as either the "Spokane stations" or the "Missoula stations." Without a specific identification of all of the stations at issue, the Commission is unable to determine the full scope of TVC's request.³⁹ Furthermore, as a procedural matter, the Commission cannot determine if the stations and the stations' franchising authorities whose rights will be altered by TVC's requested remedy have received proper notice of TVC's Petition.⁴⁰

14. In addition to TVC's failure to identify all of the stations at issue, TVC has not provided sufficient station-specific information to allow the Commission to determine if market modification is proper for each station. The two programming guides from ten years apart and the current channel line-up provided by TVC do not suffice to establish historical carriage for the Missoula stations or lack of historical carriage for the Spokane stations.⁴¹ Also, TVC provides signal coverage contour maps for only eight stations, and the maps provided show that only one of the stations could cover Eureka with an off-air signal.⁴² The driving directions are of minimal value because the relevant information is the distance between the stations' transmitters and TVC's cable headend in Eureka.⁴³ TVC provides a map that demonstrates the distance between its headend and five Spokane stations, but offers no corresponding data for any Missoula stations for comparison.⁴⁴ Finally, TVC has not provided any evidence demonstrating that the Missoula stations provide programming directed to Eureka.⁴⁵ We conclude that

³⁷ See *Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139 (requiring that a cable operator submit information for each station to demonstrate that each station should have its market modified).

³⁸ See *id.*

³⁹ Exhibit C of the Petition contains lists of certain Spokane and Missoula stations, but the Petition references Exhibit C only as information on the characteristics of the two markets and gives no indication which, if any or all, of the stations listed are subject to its market modification request. See Petition at 8, 19, and Exhibit C.

⁴⁰ The Petition's certificate of service lists 14 stations as having been served, but the text of the Petition does not make clear if these are the stations subject to its market modification request.

⁴¹ Compare Petition at 14 & Exhibits D, E, L (providing two programming guides ten years apart as evidence of historical carriage) with Petition for Special Relief of Miami Valley Broad. Corp., filed Aug. 12, 2013, at Exhibit G ("Miami Valley Petition") (utilizing five cable fact books spanning over four decades to demonstrate historical carriage of television station WHIO). See also *Petition for Modification of Dayton OH Designated Market Area With Regard to Television Station WHIO-TV, Dayton, OH*, 28 FCC Rcd 16011 (MB 2013) ("WHIO Order") (granting in part and denying in part).

⁴² See Petition at Exhibit J.

⁴³ See Letter from Steven A. Broecker, Senior Deputy Chief, Media Bureau, FCC to Bruce E. Beard, et al., Counsel to the Bend Stations, Mar. 28, 2012 (requesting that the petitioner supply calculated distances between the transmitter site of the station and the communities at issue); see also *California-Oregon Broadcasting, Inc. D/B/A Crestview Cable Communications for Modification of the DMA for Stations: KFXO, NPG of Oregon, Inc., Bend, OR; KOHD, Three Sisters Broadcasting LLC, Bend, OR; KVTZ, NPG of Oregon, Inc., Bend, OR*, 2014 WL 1466886 (F.C.C.) (MB rel. April 15, 2014) ("Crestview Order") (granting in part and denying in part).

⁴⁴ See Petition at Exhibit I.

⁴⁵ Materials used for evidence of Eureka programming may include excerpts from logs showing programs by name, general content description, and time period. Such evidence would make clear how the programming is targeted at the specific interests of Eureka residents. Indications of the amount or percentage of each station's overall programming time directed at Eureka as opposed to other communities are also helpful. See Letter from Steven A.

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the information provided by TVC falls short of the quantity and quality of evidence that the Commission has previously found necessary to grant a market modification request.

15. Because we find that TVC has not satisfied the evidentiary requirements of a market modification request, we dismiss TVC's Petition without prejudice. TVC may re-file a petition with appropriate evidentiary support as required by our rules and discussed in Section II above.

IV. ORDERING CLAUSES

16. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 534, and Section 76.59 of the Commission's rules, 47 C.F.R. § 76.59, that the captioned petition for special relief (CSR-8877-A), filed by Tobacco Valley Communications, Inc. seeking modification of the markets of television stations in the Spokane and Missoula DMAs **IS DISMISSED** without prejudice.

17. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Steven A. Broeckaert
Senior Deputy Chief, Policy Division
Media Bureau

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Broeckaert, Senior Deputy Chief, Media Bureau, FCC to Bruce E. Beard, et al., Counsel to the Bend Stations, Mar. 28, 2012; *Crestview Order*, 2014 WL 1466886 (F.C.C.) *see also* Miami Valley Petition at Exhibit I (documenting 67 news stories over a two-year period concerning the communities at issue to demonstrate local service by a television station); *WHIO Order*, 28 FCC Rcd at 16011.